SUPREME COURT

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Supreme Court of the United States

October Term, 1961

No. 382.

GRANVILLE GEORGE HUDSON and CARLOS ASDRUBAL MATOS-JORDAN,

Petitioners,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the New York District,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1961

No. .....

GRANVILLE GEORGE HUDSON and CARLOS ASDRUBAL MATOS-JORDAN,

Petitioners,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the New York District,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in petitioners' consolidated appeals on June 26, 1961, which affirmed the judgment of the District Court for the Southern District of New York entered on November 2, 1960, granting respondent's motions for summary judgment and dismissing petitioners' actions to review deportation orders issued against them respectively in 1958 and 1957.

Opinions Below

The opinion of the Court of Appeals is reported in 290 F. 2d 879 and is set forth in Appendix "A". The opinion of the District Court has not been officially reported but is set out at App. C. A.[1] 4.

[1] The term "App. C. A." as used throughout refers to the Appellants' Consolidated Appendix as prepared in typewritten form, for the use of the court below.

Jurisdiction

The judgment of the Court of Appeals was entered on June 26, 1961. The jurisdiction of this Court is invoked under Title 28 U.S.C., § 1254.

Questions Presented

1. Where the substantive law of New York is that a violation of § 722(8) of the New York Penal Law does not constitute the commission of a crime, is a conviction for violation of this statute nevertheless a conviction of "a crime involving moral turpitude" for purposes of (1) exclusion under § 212(a)(9) of the Immigration and Nationality Act of 1952 or (2) deportation under §§ 241(a)(1) and 241(a)(4) of said Act?

2. Do the provisions of §§ 212(a)(9), 241(a)(1) and 241(a)(4) of the Immigration and Nationality Act of 1952 violate the due process clause of the Fifth Amendment to the Constitution of the United States in that the statutory standard of "a crime involving moral turpitude" is 'void for vagueness'?

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the Fifth Amendment to the Constitution of the United States which provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *."

The statutory provisions involved are N. Y. Penal Law § 722(8), and §§ 212(a)(9), 8 U. S. C. § 1182(a)(9); 241(a)(1), 8 U. S. C. § 1251(a)(1); and § 241(a)(4), 8 U. S. C. § 1251(a)(4) of the Immigration and Nationality Act of 1952, and are set forth in Appendix "B".

Statement of the Case

Petitioners, respectively, are alien subjects of the British West Indies and the Dominican Republic. They were admitted for permanent residence in the United States in 1913 and 1946. Except for short visits to their homelands (Hudson in 1924-25 and again in 1949-50; Matos-Jordan in 1951 and 1956) they both have remained in continuous residence in the United States since admission.

In 1937 and again in 1944, Petitioner Hudson was convicted in the Magistrates' Court of the City of New York for violating § 722(8) of the New York Penal Law. In June, 1958, fourteen years after his last conviction and six years subsequent to the enactment of the Immigration and Nationality Act of 1952, deportation proceedings were commenced against him on the ground that these convictions warranted his deportation under § 241(a)(4) of the Act. Subsequently, Hudson was ordered deported.

In 1947 and 1952, petitioner Matos-Jordan was convicted of violations of the same statute. In 1957, after hearing and administrative review, Matos-Jordan was ordered deported on the ground that his convictions warranted deportation under §§ 241(a)(1) and 212(a)(9) of the same act.

By separate proceedings (App. C. A. 5-8; 11-14), petitioners sought judicial determinations in the United States District Court for the Southern District of New York that their convictions for violating the New York statute were not grounds for deportation under the Immigration Act and, hence, that the deportation orders were void. The District Director moved for summary judgment in each case. On November 2, 1960, in identical memorandum opinions (App. C. A., 4), the district court granted the District Director's motions.

Petitioners' separate appeals were consolidated in the Court of Appeals for the Second Circuit which, on June 1, 1961, affirmed the action of the district court. Reargument was denied on June 26, 1961.

Reasons for Granting the Writ

The court below held that petitioners had been convicted of a crime involving moral turpitude within the meaning of §§ 212(a)(9) and 241(a)(1) and (4) of the Immigration and Nationality Act of 1952, in that they had been convicted of "the offense of disorderly conduct" as particularly defined in New York Penal Law § 722(8). This holding was based on the same court's prior holdings in *United States* v. *Flores-Rodriguez,* 237 F. 2d 405 (C. A. 2, 1956) and *Babouris* v. *Esperdy,* 269 F. 2d 621 (C. A. 2, 1959), certiorari denied, 362 U. S. 913. In our view, the holding of the court below raises important questions of federal law which have not been, but should be, settled by this Court.

I

Under New York law, a violation of § 722(8) of the Penal Law is not a *crime,* but an offense. *People* v. *Fox,* 205 N. Y. 490, 494; *People* v. *Grogan,* 260 N. Y. 138, 141.[2] This offense is subject to summary disposition in the Magistrates' Courts, sitting without a jury, and conviction may be had on the uncorroborated testimony of the arresting officer. *People* v. *Evans,* 19 Misc. 2d 1071, rev'd, 7 N. Y. 2d 1030. It is, therefore, not surprising that in the past ten years, more than 9,000 persons were convicted for having violated § 722(8) of the Penal Law in the City of New York alone.[3]

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[2] The suggestion in *Flores-Rodriguez* that the New York decisions holding that the offense of disorderly conduct under New York Penal Law § 722 is not a crime were "prompted in order to define the jurisdiction of the inferior Magistrates' Courts as opposed to other courts dealing with criminal conduct" (237 F. 2d, at 409) is in error. *People ex rel. Cohen* v. *Collins,* 238 App. Div. 592, 265 N. Y. S. 475; *People* v. *Sly,* 180 Misc. 96, 39 N. Y. S. 2d 474; *People on Complaint of Mulhern* v. *Kaufman,* 165 Misc. 670, 1 N. Y. S. 2d 362.

[3] *Annual report,* City Magistrates' Courts, City of New York (1951-1960).

The rationale of the decision below, as expressed in the Court of Appeals' prior holdings in the *Flores-Rodriguez* and *Babouris* cases, was that since the District of Columbia and other jurisdictions punished the conduct proscribed by § 722(8) of the New York Penal Law as a misdemeanor or a felony (*e.g.*, District of Columbia Code, § 22-2701), to "hold that the peculiar New York definition of the word 'crime' controls the interpretation of the Immigration Act would lead to an anomalous result: an alien convicted for the same misconduct as defendant in the District of Columbia or in many of the states would be excludable under subsection (e); but because this misconduct is characterized as an 'offense' and not a 'crime' in New York defendant would not be so excludable. We do not believe Congress intended such a result." *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 410; *Babouris* v. *Esperdy*, 269 F. 2d 621, 623. But under § 22-2701 of the District of Columbia Code, for example, as distinguished from §722(8) of the New York Penal Law, a conviction cannot be based on the uncorroborated testimony of the arresting officer. *Kelly* v. *United States* (C. A. D. C.), 194 F. 2d 150, 154; *cf. Wildblood* v. *United States* (C. A. D. C.), 273 F. 2d 73. Hence, as a result of a conviction in New York, the alien is now subject to deportation on the uncorroborated testimony of the arresting officer, whereas in the District of Columbia the alien in precisely the same situation cannot be convicted at all.[4]

We think it clear that in utilizing § 22-2701 of the District of Columbia Code to describe, for the purposes of the Immigration and Nationality Act of 1952, the *nature* of the offense proscribed by § 722(8) of the New York Penal Law, the court below necessarily set up two evidentiary standards

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[4] It should be noted, for example, that convictions under the Iowa statute referred to by the court below in *Flores-Rodriguez*, 237 F. 2d 405, 410 ftn. 2 (and apparently under the other statutes referred to therein), can be had only after the accused is afforded the right to a jury trial. Iowa Constitution, Article I, §§ 10 and 11; Iowa Code 1958, §§ 725.1 and 769.1, I. C. A.

for exclusion and deportation under the statute: in New York—conviction on the uncorroborated testimony of the arresting officer is sufficient; in the District of Columbia—conviction on the uncorroborated testimony of the arresting officer is insufficient. In the words of *Flores-Rodriguez*, "* * * we do not believe Congress intended such a result. * * *." 237 F. 2d, at 410.

The reason that the alien charged with a violation of § 722(8) of the New York Penal Law is not entitled to the same procedural safeguards as the alien charged with a violation of § 22-2701 of the District of Columbia Code is because a violation of § 722(8) of the New York Penal Law is *not* a crime. Yet, despite the differences in the procedural safeguards afforded the accused under these different statutes, the court below held that, for the purposes of the Immigration and Nationality Act of 1952, these statutes were the same. This holding involves an important question of federal law which has not been, but should be, settled by this Court.

II

In *Jordan* v. *DeGeorge*, 341 U. S. 223 (1950), this Court over the dissent of Justices Jackson, Black and Frankfurter, held that the term "crime involving moral turpitude" as used in the Immigration Act of 1917 was sufficiently definite in meaning to constitute a constitutional standard for deportation. In view of the persuasive reasons set forth in the dissent of Mr. Justice Jackson (341 U.S., at 232-240), this Court should re-examine, in the context of this case, its holding in *Jordan* v. *DeGeorge*.

In *Jordan*, this Court apparently was of the view that the term "crime involving moral turpitude" as used in the Immigration Act of 1917 involved crimes of violence and other crimes which consistently and uniformly had been regarded as involving "moral turpitude". In the court below, we urged that if the term "crime involving moral turpitude" as used in the 1952 Act, could be applied to offenses which,

under state law, were not substantive "crimes", then this Court's holding in *Jordan* would be undermined and that the term "crime involving moral turpitude" as used in the 1952 Act was unconstitutionally vague. The court below rejected this contention as being without merit on the authority of *Jordan* v. *DeGeorge*.

In the circumstances of this case, the holding of the court below that the term "crime involving moral turpitude" as used in the Immigration and Nationality Act of 1952 is sufficiently definite to be a constitutional standard of deportation is, in our view, an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

By reason of the foregoing, this petition for a writ of certiorari should be granted.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 348-349—October Term, 1960

(Argued May 22, 1961 Decided June 1, 1961.)

Docket Nos. 26728, 26750

GRANVILLE GEORGE HUDSON,

Plaintiff-Appellant,

—v.—

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the New York District,

Defendant-Appellee.

CARLOS ASDRUBAL MATOS-JORDAN,

Plaintiff-Appellant,

—v.—

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the New York District,

Defendant-Appellee.

Before:

CLARK, HINCKS and WATERMAN,

Circuit Judges.

PER CURIAM:

The appellants had each been ordered deported on the ground that he had "been convicted of a crime involving moral turpitude" within the meaning of Section 212(a)(9)

[8 U. S. C. § 1182(a)(9)] and Section 241(a)(1) and (4) [8 U. S. C. § 1251(a)(1) and (4)] of the Immigration and Nationality Act of 1952, in that he had been convicted of "the offense of disorderly conduct" as particularly defined in New York Penal Law § 722(8). Actions for review of these orders were brought. The said convictions under the New York Penal Law having been admitted, the court below dismissed the actions on the authority of *Babouris* v. *Esperdy*, 2 Cir., 269 F. 2d 621, certiorari denied 362 U. S. 913, and *United States* v. *Flores-Rodriguez*, 2 Cir., 237 F. 2d 405, and these appeals resulted.

The action below was right. Nothing said on these appeals persuades us to recede from the holding of the cases cited. But, as in the *Babouris* case, we limit our affirmance to the specific case here of a violation of subd. 8 of N. Y. Penal Law § 722, defining a particular offense of loitering about a public place soliciting men "for the purpose of committing a crime against nature or other lewdness," and do not hold that a conviction of other offenses under this very broad state statute, such as simple assault, is a ground for deportation under the Federal Act.

The contention that the holding in the cases above-cited gives the Immigration and Nationality Act an interpretation so vague as to be in conflict with the Fifth Amendment, is without merit. *Jordan* v. *DeGeorge*, 341 U. S. 223.

Equally without merit is the claim that our decisions conflict with the Tenth Amendment. For our decisions turn upon an interpretation of the Federal statute: they do not assume to affect the application of state law to subject matter which is properly within its sphere. *Lapina* v. *Williams*, 232 U. S. 78; *United States ex rel. Zapp* v. *District Director*, 2 Cir., 120 F. 2d 762.

Affirmed.

APPENDIX "B"

U. S. CONSTITUTION:

Amendment V.

"No person * * * shall be * * * deprived of life, liberty, or property, without due process of law; * * *."

THE IMMIGRATION AND NATIONALITY ACT OF 1952:

Section 212(a)(9), 8 U. S. C., § 1182(a)(9), provides:

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: * * *

"(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime; * * *."

Section 241(a)(1), 8 U. S. C. § 1251(a)(1), provides:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry; * * *."

Section 241(a)(4), 8 U. S. C. § 1251(a)(4), provides:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) * * *

(2) * * *

Appendix "B"

(3) * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

THE NEW YORK PENAL LAW:

Section 722(8), L. 1923, c. 642, § 1, provides:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: * * *

"(8) Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness; * * *."

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CARLOS ASDRUBAL MATOS-JORDAN,
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P. A. ESPERDY, DISTRICT DIRECTOR OF THE
IMMIGRATION AND NATURALIZATION SERVICE
OF THE UNITED STATES FOR THE
NEW YORK DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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